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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931—No. 20

EARLE & STODDARD, INC., *et als.*, Owners of Cargo on the Steamship "GALILEO",

Petitioners,

—against—

ELLERMAN'S WILSON LINE, LTD., Owner of Steamship "GALILEO",

Respondent.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

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The Fire Statute does not bar recovery of such damages to cargo as resulted "inevitably" from a breach by the shipowner of the warranty of seaworthiness. Such breach constitutes "neglect". *The Etna Maru,* 33 Fed. 2nd 232, 234 (C. C. A. 5). Especially so where, as here, reasonable care was not used to correct the dangerous condition before sailing. It is entirely immaterial, so far as the damages from unseaworthiness are concerned, what the antecedent conditions were (whether a negligent act of the chief engineer or otherwise) which led to the shipowner's failure to supply a seaworthy vessel. And certainly this is so where the effects of such earlier negligence were observable by the shipowner or an unskilled man in the loading port, and could have been remedied before sailing..... 3

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Petitioners,

—against—

ELLERMAN'S WILSON LINE, LTD., Owner of Steamship "GALILEO",
Respondent.

October Term, 1931.
No. 809.

REPLY BRIEF FOR PETITIONERS IN SUPPORT OF PETITION FOR CERTIORARI.

In order that the true issue may not be obscured, we quote the following from the opinions below which has been omitted altogether from the statement of the case on pages 1 to 3 of respondent's brief.

The District Court:

> "The libellants contend that not only was the ship not seaworthy when she commenced the voyage, but that respondent had not exercised due care to make her so, and that therefore the respondent is liable for the loss of the cargo; while the respondent relies on the defense of the Fire Statute (U. S. C. A., Title 46, Sects. 182, 187)." (R., p. 727.)
>
> "There remains for consideration the question whether respondent is liable on account of

the unseaworthiness caused by the negligent act of the chief engineer in loading a new supply on the hot coal. Libellants claim that respondent failed in a non-delegable duty to have reasonable care exercised to make the vessel seaworthy before her departure. *Concededly at the commencement of the voyage the 'Galileo' had within her a condition so dangerous that a bunker fire was inevitable and did in fact result within six hours."* (R., p. 735.) (Italics ours.)

[The respondent admitted in its answer that "all the loss and damage" sued for was caused by such bunker fire (R., p. 69).]

"Libellant's contention that respondent is liable for the loss even though it was caused solely by the negligence of the chief engineer is based on the theory that *respondent was under a contractual obligation to the shippers that reasonable care be exercised by all concerned to make the vessel seaworthy before she left port.* It is not contended that the doctrine of *respondeat superior* makes respondent liable, but that the negligence of the chief engineer caused a breach of contract on the part of the owner." (R., p. 738.) (Italics ours.)

"Libellants construe the statute to mean that *the exemption is granted only upon condition that the owner's general maritime obligation in regard to the seaworthiness of the vessel at the commencement of the voyage be fulfilled to the extent of having due care exercised by all connected with it,* whether the owner's representatives or the ship's officers; in other words, that the distinction which the statute makes between the owner's neglect and the ship officers' negligence has no application to

matters affecting the seaworthiness of the vessel at the commencement of the voyage" (R., p. 738). (Italics ours.)

The Circuit Court of Appeals (R., p. 789):

> "The new coal was taken on a day or two before the 'Galileo' sailed, so that at the commencement of her voyage there existed within her, as the court expressly found, a condition so dangerous that a bunker fire was inevitable. Therefore, within authoritative definitions of seaworthiness (*The Sylvia,* 171 U. S. 462, 464; *The Southwark,* 191 U. S. 1, 9) the 'Galileo' was unseaworthy when she sailed, and this was due to her chief engineer's negligence."

Counsel's statement (Respondent's Brief, p. 2) that we have been guilty of a misstatement and that our argument is contrary to "an express finding" of both Courts below, is entirely without support. When his reasons for that statement are examined, it is obvious that they are based on the assumption that by the device of inserting in the bill of lading a clause incorporating the limitation statute, a shipowner may reduce his obligation to make a ship seaworthy below that of using due diligence to make her so. Such an assumption is contrary to the decisions of this Court in *Pendleton* v. *Benner Line,* 246 U. S. 353; *The Malcolm Baxter, Jr.,* 277 U. S. 323; *The Caledonia,* 157 U. S. 124; *Luckenbach* v. *McCahan Sugar Refining Co.,* 248 U. S. 139; *Capitol Transportation Co.* v. *Cambria Steel Co.,* 249 U. S. 323, and *The Carib Prince,* 170 U. S. 655. We agree that respondent's contention is in accord with the conclusion of law of the Courts below, and respectfully point out that they have thus in effect

flatly repudiated the foregoing decisions of this Court. Counsel for respondent is in error, however, in referring, at page 2 of his brief, to this conclusion of law as a finding, because it is in no sense a finding of fact. On the contrary, it is the conclusion of law which we pray this Court to review. It is in conflict with decisions of this Court and decisions in other circuits, as we have shown in our petition and brief, particularly with that of the Fifth Circuit in *The Etna Maru,* 33 F. (2d) 232, affirming 20 F. (2d) 143.

Neither in the petition for certiorari, nor in the brief in support thereof, has any contention been made by us that the owner had "waived the Fire Statute by the bills of lading", or had "contracted themselves into a greater and unlimited liability". What counsel for respondent says with reference to waiver is therefore irrelevant. Our position was stated by the Circuit Court of Appeals in its opinion in the present case as follows (R., p. 787):

> "Conceding this to be the law when the ship is seaworthy at the commencement of her voyage, the libellants contend that the rule is different when she sets out in an unseaworthy condition and due diligence has not been used by the ship's officers to make her seaworthy."

To which the Court should have added:—and when the only damages sought to be recovered are those resulting inevitably from the unseaworthiness, and when ordinary care by inspection in the loading port by the shipowner, or even by an unskilled man, would have disclosed the unseaworthy condition. In other words the misapprehension under which counsel for respondent labors is that

he treats the Limitation Statute as a bar to the recovery of such damages as directly and inevitably result from unseaworthiness.

Walker v. *Transportation Co.*, 3 Wall. 150, upon which counsel apparently places his chief reliance, is not in point, because in that case the vessel was not found to be unseaworthy. Therefore, of course, no breach of the warranty was involved, and no question as to liability for such damages as flow from unseaworthiness was raised or passed upon. Nor was any question raised, or involved, in the *Walker* case as to whether the neglect of the shipowner to supply a vessel which was seaworthy, so far as due diligence could make her so, constituted neglect of the shipowner within the exceptive proviso in the Fire Statute.* This was clearly pointed out by the Circuit Court of Appeals for the Fourth Circuit in *Charbonnier* v. *United States*, 14 F. (2d) 174, at page 177 (see our brief in support of the petition, at page 17, where we quote a passage from *Charbonnier* v. *United States*, distinguishing *Walker* v. *Transportation Company*). Counsel for respondent has made no attempt in his brief to meet that obvious ground of distinction.

There is no justification for the statement of counsel for respondent, at the bottom of page 2 of his brief, that

> "the alleged quotation from the bills of lading on page 4 of Petitioners' Brief is a distortion of

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* Yet those are the issues raised by the facts in the present case, and are so stated by the Circuit Court of Appeals in its opinion, and its conclusion or legal inference from those facts is precisely the opposite of that drawn on the same facts by the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru*, 33 Fed. (2nd) 232.

> the exceptions clause appearing in the bills of lading."

See Record, page 698, for the original of the bill of lading. We merely omitted irrelevant parts of a very long exceptions clause in a bill of lading which as drafted is most difficult to read. It is significant that counsel does not specify a single word which we should have included.

In referring to a passage quoted from the District Court's opinion in *The Etna Maru,* 20 F. (2d) 143, counsel for respondent says:

> "The exact contrary has been held by this Court in many cases. See the cases cited on pages eight and ten of this brief" (Respondent's Brief, p. 12).

Not one of these cases supports respondent's statement. An examination of the opinion of the Circuit Court of Appeals for the Fifth Circuit in *The Etna Maru,* 33 F. (2d) 232, shows plainly that the *ratio decidendi* of that Court's decision is that the Fire Statute does not exempt the shipowner from such damages as flow from unseaworthiness. The Court said:

> "Appellant concedes, apparently, that if the charter had been entered into personally, the warranty of seaworthiness would have barred the relief of the limited liability laws."

And again the Court said:

> "it is certain that the unseaworthiness of the vessel at the beginning of the voyage amounted to negligence of either itself or its employees. There is nothing in the statute to bar a recovery against

the ship. *Richardson* v. *Harmon*, 222 U. S. 96; *Capitol Transportation Co.* v. *Cambria Steel Co.*, 249 U. S. 334; *The Malcolm Baxter, Jr.*, 277 U. S. 323."

Respectfully submitted,

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